

Article 19: Misleading Statements Made by the Platform Operator

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ARTICLE 19: MISLEADING STATEMENTS MADE BY THE PLATFORM OPERATOR

1. If a platform operator makes misleading statements about suppliers or about goods, services or digital content offered by suppliers, the platform operator is liable for damage which this misleading information has caused to customers.
2. If a platform operator makes misleading statements about customers, the platform operator is liable for damage which this misleading information has caused to suppliers.

1. Main content and function

1.1 The principle of liability of the platform operator for damage caused by misleading statements made by the platform operator

Article 19 provides for liability of the platform operator to customers or to suppliers for damage caused by the misleading statements made by the platform operator. Pursuant to Article 19 section 1, if the platform operator makes misleading statements about suppliers or about goods, services or digital content offered by suppliers, it is liable for damage that this misleading information has caused to customers. If a platform operator makes misleading statements about customers, under Article 19 section 2 it is liable for damage that this misleading information has caused to suppliers.

1.2 Function

The purpose of this provision is to ensure the reliability of information provided to the platform users, and to create the basis for compensation in the case of

misleading statements.¹ This provision takes into account the significance of information placed on the online intermediary platforms through which supplier-customer contracts are concluded. The platform operator concludes with a supplier (platform-supplier contract) and a customer (platform-customer contract) a contract on the use of an online intermediary platform (Article 2 letters f and g). In principle, the platform operator does not deliver goods or provide services or digital content to consumers, but operates an online intermediary platform that enables customers to conclude contracts with suppliers of goods, services or digital content.² The platform operator makes available virtual space and fulfills the function of a so-called 'joint' connecting parties to the supplier-customer contract.³

However, online intermediary platforms that provide services that only identify relevant suppliers and that direct customers to those suppliers' websites or contact details, are excluded from the scope of application of the Discussion Draft (Article 2 letter a). Contracts between suppliers and customers are concluded through online intermediary platforms, hence information that identifies not only relevant suppliers but also customers are placed on the platform and constitutes a specific kind of 'entrance' for platform users for the conclusion of a contract.

When concluding supplier-customer contracts, in principle there is no oral communication between the parties whereby specific warranties and information would be received concerning properties and features of goods, services or digital content offered by the suppliers. In most cases of online intermediary platforms, communication between a supplier and a customer outside the

¹ The significant importance of users' trust in online platforms is emphasised in the discussion of the future legal shape of the online world, e.g.: European Commission, *Online Platforms and the Digital Single Market Opportunities and Challenges for Europe* [COM (2016) 288 final] ch. 5 (i) (iii); European Commission *Online Platforms* [SWD (2016) 172 final] ch. 4.1.

² There are a number of widely-known online platforms that cover certain fields of goods and services, hence the analysis of the practice of such platforms (including terms and conditions formulated by such platforms) may be instructive for the discussion of legal aspects of operation of such platforms. However, since the commentary refers to the issue of liability for misleading statements made by a platform operator, the author refrained from invoking any particular online platform; any examples used for the purpose of this commentary should be treated as abstract examples without reference to any particular platform operator (even if some articles cited in the subnotes expressly refer to particular online platforms).

³ One of the characteristic features of online platforms, indicated when the business model used by such platforms is discussed, is the feature of providing a 'medium' or 'network effects'. See: Christoph Busch, Hans Schulte-Nölke, Aneta Wiewiórowska-Domagalska, Fryderyk Zoll, 'The Rise of the Platform Economy: A New Challenge for EU Consumer Law?' (2016) 5 EuCML 3, 3–4; European Commission *Online Platforms* [SWD (2016) 172 final] ch. 2.1.3–2.1.4; Eva Inés Obergfell, Alexander Thamer '(Non-)Regulation of Online Platforms and Internet Intermediaries – The Facts: Context and Overview on State of Play' (2017) 3 GRUR Int. 201, 202. See also: Christine Riefa, *Consumer Protection and Online Auction Platforms: Towards a Safer Legal Framework* (Routledge 2015), 3 where it is maintained that 'Buyers and sellers are using the platform as a means to find each other.'

platform is not possible.⁴ Even though a customer in a private communication with a supplier by means of the method selected on the online intermediary platform may receive additional, more detailed information regarding the performance offered by a supplier, the main description of the subject-matter of the contract is located on the platform.⁵ This description of the performance available for platform users and the significance of the information published on the platform determine the specific nature of supplier-customer contracts concluded with the help of an online intermediary. For this reason, among other things, the Discussion Draft emphasises the rule that every information published on the platform should be consistent with the facts, and should not be misleading for platform users regarding content published on the platform.⁶ This is reflected in Article 17, which imposes on the platform operator a duty to remove misleading information given by the supplier (a failure to remove misleading information results in principle in the liability of the platform operator for damage, unless the platform operator proves that it took appropriate measures to remove or rectify the misleading information); this is also reflected in Article 19, which provides for the liability of the platform operator for misleading statements made by it.

2. Sources

Liability for accuracy of statements made or information given may be found under EU law. Under Article 6 section 5 of the Consumer Rights Directive, information given by a trader to a consumer constitutes an integral part of the distance or off-premises contract. Prohibition of false information in commercial practices is provided for by provisions of the Unfair Commercial Practices Directive. Under Article 6 section 1 of the Unfair Commercial Practices Directive a commercial practice should be deemed misleading if it contains false information or deceives, or is likely to deceive, the average consumer with respect to a number of elements enumerated in this provision.

⁴ This is also justified for safety reasons. For example, a platform operator may offer a set of services concerning reimbursements, guarantees, cancellations and insurance that cannot be utilised when a service is not booked through channels of communication made available by the platform operator.

⁵ On the platform's key role in communications between the suppliers and customers and related issue of the possible liability of the platform operator for the delivery of the messages sent through the platform to their addressees: Christoph Busch, Hans Schulte-Nölke, Aneta Wiewiórowska-Domagalska, Fryderyk Zoll, 'The Rise of the Platform Economy: A New Challenge for EU Consumer Law?' (2016) 5 EuCML 3, 6–7.

⁶ Cf. Article 6 section 2 of the Unfair Commercial Practices Directive, according to which 'A commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise (...).'

3. Explanation

3.1 Misleading statements

Under the provision in question, the scope of misleading statements varies depending on which party to a supplier-customer contract is the addressee of the norm in question. The differentiation of the scope of the misleading statements results mostly for the nature of the supplier-customer contract; hence the scope of information that may be misleading is much broader with respect to customers as parties receiving the performance. This scope may therefore cover information about suppliers or customers, or about goods, services or digital content. It is a close-ended catalogue, though in some instances it may be too narrow to cover all possible situations in connection with which the information may be misleading and thus may cause damage (for example, in a case where the platform operator's misleading statement about a supplier has caused damage to that supplier; see: the observations made in section IV of the commentary on Article 19).

Information published on online intermediary platforms create specific customer expectations regarding the suppliers or goods, services or digital content offered by the suppliers, as well as supplier expectations about customers.⁷ In the absence of Article 19, it would be difficult to find grounds for the liability of the platform operator for damage caused by misleading statements it made. This is because, in principle, making a statement as to a particular state of affairs (even if untrue or misleading), does not generate contractual liability on the part of the person that made such a statement⁸ (even though it is a separate question whether, in a particular situation, such a statement could generate tort liability; this question, however, falls outside of the scope of this commentary).

⁷ Christoph Busch, Hans Schulte-Nölke, Aneta Wiewiórowska-Domagalska, Fryderyk Zoll, 'The Rise of the Platform Economy: A New Challenge for EU Consumer Law?' (2016) 5 EuCML 3, 6.

⁸ See, however, Article 4 of the Consumer Sales Directive. Pursuant to Article 4 of this Directive, if a final seller under a contract of sale with a consumer is liable for lack of conformity of the goods with the contract resulting from an act or omission by the producer, a previous seller in the same chain of contract or any other intermediary, the final seller has the right of redress towards such persons. One of the criteria taken into account when assessing the conformity of goods with the contract (and hence the liability of the final seller) is the content of any public statement on the specific characteristics of the goods made by the producer or his representative, as provided for by Article 2 section 2 letter d of the Consumer Sales Directive. It follows from these two provisions that a statement, especially one made by a producer, may generate the liability of the producer even towards a person that is not a party to a contract with the producer, provided that such a person (the final seller) is liable towards a consumer, and hence is granted a recourse action against the producer.

3.2 Information presented on online intermediary platforms as an invitation for the conclusion of a supplier-customer contract

What is essential for the decision taken by the customer on the purchase of goods, services or digital content offered by a supplier on online intermediary platforms is the information published in the description of the goods, services or digital content offered.⁹ Information that specifies a supplier, including, for example, a statement of its reliability, may be taken into account when a customer is choosing a particular offer. For the supplier, in turn, crucial information is that referring to the customer. The supplier enters into a contractual relationship with a customer, and under the supplier-customer contract becomes obliged to deliver goods or provide services or digital content (Article 2 letter e). Therefore, it is also in this case that the final decision of the supplier on the conclusion of a contract may be dependent upon the information published in the profile of a given customer.

Example: Information on a specific feature of customers may be a decisive factor for the supplier who – as a person letting room in his or her private apartment, for example – may have no experience in the respective sector of services, and may count on the reliability of the platform operator and contracts concluded through the platform. Information that describes customers registered as users of the platform as trustworthy and reliable may generate justified trust in the customers as prospective parties receiving the offered performance; it may also generate confidence that the platform operator has specific mechanisms that enable the verification of the registered platform users.

In cases of a particular online intermediary platform, it is possible that it is the platform operator that may select customers for the supplier and submit to the supplier a particular proposal on the supplier-customer contract. However, if a particular platform operator envisages such a method, the provisions of the Discussion Draft impose on the platform operator the duty to inform a supplier not only about the selection of customers made by the platform, but also about whether the supplier has the right to reject a proposed customer (Article 13 letter e; the Discussion Draft also provides for an alternative option of the wording of Article 13 letter e: ‘the right to reject a proposed supplier-customer contract’).

3.3 The categories of information published on online platforms that may cause damage to customers and suppliers

Online intermediary platforms contain various kinds of information regarding – depending on the profile of the platform – goods, services or digital content, as well as information that describes particular platform users, namely suppliers

⁹ Self-evidently, information about the prices of goods and services offered by suppliers through the platform is one of the decisive factors for the customer’s decision as to whether he or she should purchase the particular goods or services offered via the platform.

and customers. Information about goods, services or digital content are, in principle, published on the platform by the supplier, who in accordance with the definition under Article 2 letter d uses an online intermediary platform for marketing goods, services or digital content to customers, and is interested in presenting and describing his or her offer in such a manner that as many customers as possible use the offer of performance placed on the platform by him or her. Information of this kind is also published by the platform operator itself, which also benefits from effective promotion of the performances offered by suppliers within the specific profile of the platform.¹⁰ In connection with Article 19 which provides for possible liability of the platform operator for misleading statements it should be primarily resolved what kind of information may be misleading and lead to the liability of the platform operator for damages and which statements among those published on the platform are statements actually made by the platform operator and whether there are any helpful criteria for attribution of statements placed on the platform?

Information posted on the platform may in principle refer to any aspect of goods, services or digital content offered by suppliers (including specific quality or usefulness of the performances offered; preservation of particular standards or requirements in particular aspect).¹¹ It may also specify features and particular properties of suppliers and customers. Information of this kind may be posted on the basis of the evaluation of the previous activity of a given supplier or customer on the platform and with taking account of, for example, number of comments of other platform users or other kind of criterion adopted. Information pointing to particular features of suppliers or customers may also results from the verification done by the platform operator of the platform users with respect to fulfilment by them of specific standards required from every registered platform user.

Such information may take form of a general statement under which 'all our suppliers are very reliable and fulfil their duties under supplier-customer contract with due care,' or: 'apartments or rooms offered via our platform are clean and properly prepared.' The platform operator may also envisage specific symbols and introduce definitions of such symbols. The placement of particular symbol in the profile of respective platform user will mean that the performance offered by him or her fulfils the standard specified by the

¹⁰ Christoph Busch, Hans Schulte-Nölke, Aneta Wiewiórowska-Domagalska, Fryderyk Zoll, 'The Rise of the Platform Economy: A New Challenge for EU Consumer Law?' (2016) 5 EuCML 3, 8 on the creation by many platforms of a uniform brand that promises achieving specific quality of services for ones that decide to choose the services provided by suppliers under this brand. On the value delivered to the platforms by their users see e.g. European Commission *Online Platforms* [SWD (2016) 172 final] ch. 2.1.3.

¹¹ For example, if a platform is used for booking accommodation services, the platform may formulate conditions that the property rented must meet in order to receive certain status in the classification used on the platform.

contents of respective symbol; or that respective supplier has properties or features which have been attributed to a respective symbol¹² (like for example a platform through which accommodation is booked may define a specific category of suppliers who offer accommodation services with a high standard, a category being symbolised by a certain word or sign (symbol). The symbol of such a superb supplier may be added to the profile of the respective supplier on the basis of his or her activity on the platform, among other things, and positive comments and opinions of the customers who have used the service offered by the supplier. However, it is the platform operator that ultimately places the symbol in the profile of the supplier, hence it can be maintained that the placement of a particular pre-defined symbol constitutes the statement of the platform operator as to features specified by the contents of such symbol¹³).

Article 19 limits the application of the regulation solely to statements about suppliers or customers, or about goods, services or digital content offered by the suppliers. What is outside of the scope of application of this provision is the information regarding organisational or technical aspects of the operation of the platform.

3.4 Questionable issues under the regulation of Article 19

The following questions should be resolved for the interpretation of Article 19. Firstly, it needs to be determined what the subject-matter of the damage may be, and whether the damage should result from misleading information or from some external circumstance that was inconsistent with the information published on the website? These issues are also connected to the question concerning the manner of determining the scope of the damage and the causal link between the damage and the misleading information. Secondly, it needs to be resolved how the scale of the damage incurred should be measured within the context of the performance or non-performance of the supplier-customer contract or the performance of the contract in accordance with the standard

¹² As the analysis of the market practice shows, the platform operator may set certain rules or conditions for the attribution of a particular symbol. The conditions to be fulfilled by a respective supplier might refer to the amount of contracts fulfilled by the supplier, the amount of positive responses and positive reviews received by the supplier, the number of stars attributed to the service in reviews, the star ratings left by customers, the performance of contracts without the cancellation of services, et cetera.

¹³ This issue may make platform operators very cautious with respect to any classification or descriptions placed on the platforms, and is the reason for formulating specific disclaimers and clarifications as to the words used. The problem may be exemplified even by relatively simple word like 'verified' attributed to the user on a platform, since it may be questioned whether the verification refers to the ID of a user (and if so, whether it refers solely to the completion of a formal verification procedure, or is a substantive guarantee by the platform operator as to the identity of the user), or the quality of his or her services. An analysis of the practice of platform operators indicates that in a such case a specific clarification may be contained in the terms of services formulated on such a platform, which excludes any liability for describing a user as verified, and which clarifies that the attribute only refers to the ID verification process and does not constitute any endorsement, certification or guarantee by the platform operator about any user.

specified in the contract by the supplier, but in violation of the standard specified in the statements made by the platform. This issue is mostly connected with the question concerning the impact of statements of the platform operator on the supplier-customer contract.

3.5 The impact of statements of the platform operator on the supplier-customer contract

The information presented on the platform cannot be analysed in separation from the supplier-customer contract. Such information fashions the contractual expectations of the customer or supplier with respect to the contents of the information in question.¹⁴ In many cases, the customer or the supplier would not enter into the contractual relationship and would not take a decision to conclude the contract through the platform if not for the specific information placed on the platform.

The provisions of the Discussion Draft do not resolve the question as to whether (and if so – to what extent) the statements published by the platform operator on the platform are included in the contents of the contractual relations between the supplier and the customer.¹⁵ Under Article 22 section 1, it may be inferred indirectly that, since a supplier may become liable towards a customer, cases may exist where statements of the platform operator become part of the supplier-customer contract. However, the Discussion Draft does not contain any regulation that would specify prerequisites upon the fulfilment of which the supplier would become liable for misleading statements made by the platform operator. The regulation of this issue, in turn, and the specification of prerequisites for the liability of the supplier for misleading statements made by the platform operator might make it easier to assess the possible impact of the statements of the platform operator on the contents of the supplier-customer contracts.

A determination that statements made by the platform operator modify the contents of the supplier-customer contract would lead to the imposition of additional contractual obligations on the supplier, which might be equivalent to the reformulation of the pattern of a proper performance of obligation by the supplier, if the contents of the statements of the platform operator set a different pattern in this respect.

¹⁴ Christoph Busch, Hans Schulte-Nölke, Aneta Wiewiórowska-Domagalska, Fryderyk Zoll, ‘The Rise of the Platform Economy: A New Challenge for EU Consumer Law?’ (2016) 5 EuCML 3, 6.

¹⁵ Cf. Article 2 section 2 letter d) of the Consumer Sales Directive, which provides for one of the criteria of assessment of conformity of consumer goods with the contract of sale. Under this provision, any public statements on the specific characteristics of the goods made by, inter alia, the producer or his representative (who, as opposed to the seller, are not parties to a contract of sale with a consumer) should be taken into account for the assessment of the scope of reasonable expectations of the consumer that determine the issue of conformity of goods with the contract of sale. This is an example of a model under which a statement of a third party may have impact on the contract between a consumer and the seller, and hence on the seller’s contractual liability.

3.6 The model of liability of the platform operator as a criterion for determining the assessment of the impact of statements made by the platform operator on the contents of the supplier-customer contract

While determining to what extent the statements made by the platform operator about suppliers or customers, or about goods, services or digital contents offered by the suppliers fashion the contents of the supplier-customer contract, it is possible to invoke the principles of liability of the platform operator for the non-performance of the supplier-customer contract. The Discussion Draft introduces, in principle, two models of liability of the platform operator in this respect. The first one is applicable in a case where a platform operator presents itself to customers and suppliers as an intermediary in a prominent way. As significant independence of the supplier exists under this model, the Discussion Draft provides for no liability of the platform operator for the non-performance under supplier-customer contracts (Article 16 section 1). The other model of liability, under which the platform operator is jointly liable with the supplier, applies in situations where the customer can reasonably rely on the platform operator having a predominant influence over the supplier (Article 18 section 1). In such cases, the Discussion Draft provides for joint liability of the platform operator with the supplier for the non-performance of the supplier-customer contract.

Under these models, it can be argued that, in the case of the platform operator's predominant influence over the supplier, any statement from the platform operator about suppliers or customers, or about goods, services or digital content offered by the suppliers will automatically be a part of the supplier-customer contract and will modify its contents while extending the scope of liability of the supplier (this interpretation would also justify the wording of Article 22 section 1, which grants the supplier the right of redress towards the platform operator when the supplier is liable for misleading statements made by the platform operator). In the case of the first model of liability, when a platform operator presents itself to customers and suppliers as an intermediary in a prominent way, it should be concluded that statements made by the platform operator do not become part of the supplier-customer contract and remain outside the contractual relationship between the supplier and customer. In this case, the customer would not have a claim against the supplier for performance of the contract in a manner inconsistent with the statements of the platform operator published on the platform, and the sole entity liable for damage caused by misleading information would be the entity that made a particular statement, namely the platform operator (the sole grounds for any claim would be Article 19 in this case).

3.7 The significance of the impact of the statements of the platform operator on the supplier-customer contract

Under Article 22 section 2, and in cases where the prerequisite of the predominant influence over the supplier is fulfilled, a principle may be accepted of automatic inclusion of the statements made by the platform operator to the supplier-customer contract. However, three issues should be considered in that regard. Firstly, the assessment of the impact of the statement of the platform operator does not modify the principle of the liability of the platform operator under Article 19. The provision of Article 19 constitutes separate grounds for the liability of the platform operator for damage caused by the misleading information, and for this provision to apply, it is not important whether the statements of the platform operator are part of the legal relationship between a supplier and a customer or not. Even if it is maintained that the statements of the platform operator are part of the supplier-customer contract and extend in this manner the scope of liability of the supplier with elements indicated in these statements, the issue of joint liability and compensation for damage by the platform operator are treated separately, as they are regulated by separate provisions (see Article 22 section 2. and Article 18). Secondly, the determination that the contents of the statements of the platform operator are automatically part of the supplier-customer contract would mean that, in a situation where the platform operator published information on the online platform that all the rooms being offered have golden doorknobs, the supplier would become obliged to ensure that the room offered has golden doorknobs. As a result of the above, every statement made by the platform about suppliers, goods, services or digital content offered by the suppliers would also be a statement by the supplier addressed to the customers (implied attribution of the statements). However, under Article 19 this issue cannot be conclusively resolved since Article 19 does not pertain to this issue. The addressee of the norm expressed in Article 19 is solely the platform operator, and this provision specifies solely the results that may arise for the platform operator in cases when misleading statements are made. The results specified under Article 19 do not have to arise on the part of the supplier. Finally, it should be noted that the assessment of the value of the performance due under the supplier-customer contact, the value that would be subject to a possible increase by the contents of statements made by the platform operator, may influence the determination of the final magnitude of the compensation due for the damage caused by the misleading statements of the platform operator. For an assessment of the magnitude of the damage caused by the misleading statements made by the platform operator, it is not necessary to resolve the issue as to whether the statements made by the platform are part of the supplier-customer contract. However, it might be helpful to refer to the contents of the relation between the supplier and customer, and to the performance actually performed under

the supplier-customer contract. Taking account of the value of the performance actually received by the customer, and determining the extent to which the interest of the customer has been satisfied as a result of the performance, may result in decreasing the magnitude of the compensation due for the damage caused by the misleading statements (sometimes the performance of the supplier may be of greater value than the price paid, and the value of the performance described in the offer on the platform's profile; in which case the increase in the value of the performance may compensate for the damage caused by the lack of specific property as declared in the statement made by the platform operator, but has not been reflected in the performance actually received by the customer). It seems that in most cases the calculation of the scale of the damage caused by the platform operator's misleading statements will not be possible without reference to the value of the performance carried out under the supplier-customer contract.

3.8 The damage caused by misleading statements made by the platform operator – introductory remarks

The wording of Article 19 as adopted under the Discussion Draft, or any other provision thereof, does not specify the criteria for assessing the damage and calculating the compensation. The Discussion Draft is based on the assumption that this issue should be resolved under applicable rules of national legal systems. However, the assessment of the damage may prove to be one of the crucial practical issues under Article 19, and since there is no specific provision pertaining to the manner of calculating the damage caused by the misleading information, a selection of problems should be discussed in that regard.

3.9 Criteria helpful with respect to calculating the magnitude of the damage caused by the misleading information – practical difficulties

Calculating the damage might be done with reference to a hypothetical situation constructed on the basis of a prognosis of what would be if particular information was not misleading.¹⁶ Calculating the damage caused by mislead-

¹⁶ On the general measure of contractual damages under particular legal systems, see: Christian von Bar, Eric Clive, Hans Schulte-Nölke, Hugh Beale, Johnny Herre, Jérôme Huet, Peter Schlechtriem, Matthias Storme, Stephen Swann, Paul Varul, Anna Veneziano and Fryderyk Zoll (eds.) *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Sellier 2009) 944–946. As an example of possible regulation of the general measure of damages see: Article III.-3:702 DCFR according to which the purpose of an award of damages is to 'put the creditor, as nearly as possible, into the position in which the creditor would have been if the obligation had been duly performed'. Cf. however, Article II.-7:204 (Liability for loss caused by reliance on incorrect information) under which 'the party misled by incorrect information is entitled to reparation for the loss that the incorrect information has caused' (the provision mentioned applies to a situation

ing information may be based upon the following criteria: (1) the comparison of the value of the performance received and the price paid, with the market price due for a given kind of performance (market value criterion); (2) the comparison of the value of the performance received and the price paid for that performance with the price offered by other suppliers for a given kind of performance on the platform (the price on the platform criterion).

On account of the specific features of some online platforms, calculating the damage at under market value may lead to unjust results, since one of the reasons for operating the platforms are the competitive prices of goods, services or digital content as compared to the market prices due for these kinds of performance. It is presumed that the price for the performance offered through the online platform will be, in principle, lower than the market price for a similar standard of such performance¹⁷ (though careful analysis of the market may demonstrate that it is possible that in some locations the prices offered by the suppliers are similar to, or even higher than, hotel prices). While applying the criterion of the price on the platform, it is necessary to take into account that prices are set in accordance with the subjective discretion of the suppliers and may *de facto* vary in comparison from one to another. However, it seems that in all cases under consideration, it is possible, in principle, to determine the average price calculated on the basis of comparable offers (it is even possible that the platform operator would suggest that its users may, while setting the price for one day, take into account prices offered by other suppliers for similar standards of offer in a given area).

3.10 Determining the magnitude of the damage in the case of other kinds of damage

Apart from the damage in the form of a decrease in the value of a performance, another kind of damage may occur, one that is a result of a negative consequence engendered by a certain circumstance incompatible with the statement. With respect to the damage of this kind, the basis for assessing the compensation

where the incorrect information was given by a party in the course of negotiations, *ibidem*, 515). The above rule for the assessment of damages, although it pertains to a breach of contract, provides for a reasonable method in this respect, and hence it may also be applied in a case where damage has been caused to suppliers or customers by the misleading statements made by a platform operator, even though making such statements does not constitute a failure by a platform operator to perform his contractual obligations towards a customer or a supplier.

¹⁷ One of the reasons for lower prices of the rental services offered through online platforms is that the suppliers renting out their properties via a platform are, in principle, not obliged to pay the tourism taxes that official hotels have to pay. A lot of complaints have arisen on this issue, mainly from the regular hotel owners who regard this as unfair competition. See: Vanessa Mak, 'Private Law Perspectives on Platform Services' (2016) 5 EuCML 19, 24; Marie Jull Sørensen, 'Private Law Perspectives on Platform Services' (2016) 5 EuCML 19, 16 where the authors analyse the business model of the chosen online platforms. On the issue of competition with respect to platform services, see: Evelynne Terryn, 'The Sharing Economy in Belgium – a Case for Regulation?' (2016) 5 EuCML 19, 45.

will be an assessment of a negative factual situation that came into being as a result of the detrimental event (namely a misleading statement). In principle, the magnitude of the damage can be assessed from an objective point of view, and it will, in principle, cover the costs of removing the consequences of a negative circumstance that resulted from that particular misleading statement.

Example: The platform operator posted information on its website that all the apartments and rooms made available by the supplier are characterised by a high level of cleanliness, specifically ‘dust-free.’ A customer, allergic to dust, decided to use the services offered through the platform on account of this information posted by the platform operator on its website. The dust present in the rented room caused an allergic reaction to the customer. The damage will include mostly the costs of purchasing medicine and the costs of treatment of illness caused by the dust.¹⁸

For an assessment of the damage, it is not, in principle, necessary to make reference to a contract between a supplier and a customer. The scope of the damage in this case is assessed on the basis of an external circumstance (here: an allergy) and the necessity of incurring additional expenses (which are not taken into account at the time of concluding the contract) related to the circumstance caused by the detrimental event.

3.11 Statements made by the platform operator that modify the description of the standard of goods, services or digital content offered by the suppliers or modify the description of the profile of the platform users

This category covers cases where, as a result of information published by the platform operator on the platform, there has been a change in the description of the standard of performance offered by suppliers. This information, in principle, results in an increase in the standard of the goods, services or digital content offered by the supplier (statements made by the platform operator may also modify to a certain extent the descriptions of suppliers or customers if the platform operator enables platform users to present their own profiles with a specification of features in a particular respect, e.g. as to the effectiveness of fulfilling accepted offers, precision in replying or trustworthiness). In the described situation, the customer receives performance

¹⁸ Under particular national laws, the cause for liability of the platform operator for damage caused to a customer in the circumstances specified in example 1, might not be contract law, but tort law. However, in some legal systems, there might be concurrent liability in contract and tort and the claimant may choose either cause of action (i.e. sue in contract as well as in tort). An assertion contained in an offer to rent out a room or apartment about a high level of cleanliness might be deemed a promise, a breach of which may result in the loss of satisfaction expected under the contract. This kind of information, if placed on the online platform, can induce the platform user to conclude the contract.

consistent with the description presented on the online platform by the supplier, but inconsistent with statements published on the platform by the platform operator, which – from the perspective of his or her contractual expectations formed on the basis of statements presented on the website of the platform and in connection with his or her own reciprocal performance under the supplier-customer contract – changes the manner of perceiving the value of the goods, services or digital content received.

Example 1: The platform operator publishes information on its website that during Christmas all rooms offered by suppliers will have their own separate bathroom, and that in every room there will be a Christmas tree. In the room rented by a customer there is a Christmas tree, but the room does not have separate bathroom. The bathroom is located in a common area on a separate floor in the building. The price paid by the customer for one day for the room without bathroom is EUR 200. The market price for one day in a room with a bathroom with a similar standard and in the same location is during Christmas EUR 200; and the market price of a room without a bathroom in this period is EUR 100.

Example 2: The facts as depicted above, but the price paid by the customer for one day in a room without bathroom is not EUR 200 but only EUR 100 (which corresponds to the market price of a room without bathroom, and half the market price of a room with a bathroom).

In the situation described in Example 1, due to the decreased value of the performance as compared to the description published on the platform and due to the excessive price as compared to the market price offered for rooms of this kind – the assessment of damage seems to be relatively simple. The comparison of the price and the value of the room rented through the platform to the market price due for a similar standard of room leads to the assessment of damage in the amount of EUR 100.

In Example 2, in turn, the assessment of damage involves a number of questionable issues, the resolution of which will be dependent on the adopted criterion for an assessment of damage. A question arises primarily, whether – if the customer received performance for a price equivalent to market price due for this kind of performance – the customer suffered any damage at all? Should it be assumed that the damage to the customer in this case is the fact that he or she has not received performance of the value of EUR 100, namely a room with a bathroom, which he or she should receive, in accordance with the statement published on the platform by the platform operator. In this case, the amount of damage would be the value of the price paid, namely the amount of EUR 100, which should be decreased in accordance with the assessed value of performance received by the customer under the supplier-customer contract. Or perhaps it should be argued that the customer would not have concluded the contract with the supplier at all, if there had been no statement that all the

rooms offered by the supplier have a bathroom, and hence the damage would be equivalent to the price under the contract concluded, namely EUR 100, decreased by the value of the performance received by the customer?

Since the one of the presumptions that underlies the Discussion Draft is that the issue of any calculation of the amount of damage and compensation should be left to national laws, it is under these laws that the above questions should be resolved.

4. Relation to other provisions in the Discussion Draft

An interpretation of Article 19, as demonstrated above (see: the explanation section of the commentary on Article 19) may require taking into account the placing of this provision within the set of rules established under the Discussion Draft (in particular the rules formulated under Article 18 and Article 22 section 2¹⁹). However, making reference to these provisions does not change the basic rule explicit in Article 19, i.e. a platform operator's liability for his misleading statements. Additionally, in certain cases some ambiguity might arise as to whether the wording of a particular statement made by a platform operator should be deemed a misleading statement. For example, this is the case where the platform operator details the specific quality of the services offered by the suppliers, but where the quality of services provided by the suppliers does not correspond to that given by the platform operator. Alternatively, should this statement be treated as a guarantee given by the platform operator? And if so, should Article 20²⁰ be applied? Hence, in order to assess the consequences of the platform operator's failure to perform its promises would require taking into account not only the regulation of Article 19, but also the regulation of Article 20 (for the possible overlapping of the scope of application of Articles 19 and 20 see: the explanation section of the commentary on Article 20). Articles 19 and 20 provide for the grounds for the possible liability of the platform operator for misleading statements made by it and for guarantees given, which constitute the platform operator's own acts ('primary liability' – *originäre Haftung*);²¹ as opposed to the possible platform operator's liability that may arise in the event of a breach of a supplier-customer contract by a supplier.²²

¹⁹ Cf. Art. 18 Commentary, 3. Explanation and Art. 22 Commentary, 4. Relation to other provisions in the Discussion Draft.

²⁰ Cf. Art. 20 Commentary, 3. Explanation.

²¹ Christoph Busch, Gerhard Dannemann, Hans Schulte-Nölke, 'Ein neues Vertrags- und Verbraucherrecht für Online-Plattformen im Digitalen Binnenmarkt?' (2016) 12 MMR 787, 789.

²² See details in: Christoph Busch, Hans Schulte-Nölke, Aneta Wiewiórowska-Domagalska, Fryderyk Zoll, 'The Rise of the Platform Economy: A New Challenge for EU Consumer Law?' (2016) 5 EuCML 3, 7-9. See also: Research Group on the Law of Digital Services, 'Discussion Draft of a Directive on Online Intermediary Platforms' (2016) 5 EuCML 164, 165.

Apart from the above, several additional remarks should be made. The provision in question is an extension of the regulation under Article 16, which enumerates grounds for the liability of the platform operator, one of which covers the liability of the platform operator for misleading statements (under Article 16 section 2 letter c the platform operator may be liable to customers or suppliers for misleading statements made by the platform operator).

The sanction provided for under Article 19 reflects the general idea that one of the methods to protect customers is to provide them with clear information. This idea is also reflected in Article 5,²³ which provides that the information to be provided under the Discussion Draft must be clear and transparent. This general rule may serve as a criterion for judging whether information may be classified as misleading (since statements that lack clarity or transparency may mislead the recipient, i.e. platform users).

5. Criticism; amendment proposals

The purpose of Article 19 is well justified. However, it may raise a number of practical difficulties for courts, depending on the applicable national legal system. Practical difficulty may arise with respect to assessing damage and compensation, as demonstrated above. However, there is another crucial aspect of liability that is not addressed by this provision. The provision is silent regarding the issue of fault, i.e. whether it is strict liability or fault-based liability (and in the case of the latter, whether it is based on intentional fault or negligence). Moreover, if the issue of fault is relevant, the provision is silent regarding the burden of proof. This may lead to different results in the application of the rules in question depending on certain presuppositions of the judges (and lawyers in general) derived from national legal systems. This controversy may lead to uncertainty as to the actual rules for liability and the standard of diligence that should be exercised by a platform operator that may be potentially liable under the provision in question (or even whether the diligence is of any importance). This issue should be resolved explicitly by the provision. The decision as to whether the liability in question should be shaped as a strict liability of fault-based liability may be open to debate. While drafting any amendment in that regard, it would seem reasonable, however, to take into account whether the customer can reasonably rely on the platform operator having a predominant influence over the supplier (as defined in Article 18 section 2). It may be argued that at least in that case, creating strict liability for misleading statements would be justified. In other cases, it would be reasonable to allow the platform operator to exclude its liability by proving that due

²³ Cf. Art. 5 Commentary, 1. Main content and function.

care was exercised for the verification by the platform operator that a relevant statement or piece of information is true.

In view of the above remarks, and based on the current version of the Discussion Draft, Article 19 section 3. might be added and the following wording may be put for consideration:

A platform operator is not liable for damage caused by misleading information under Article 19.1. or 19.2. if a platform operator did not know and could not know that the information was misleading despite exercising due care, unless where Article 19.1. applies, the customer could reasonably rely on the platform operator having a predominant influence over the supplier in accordance with Article 18.2.

Moreover, the content of section 1 and section 2 in the current version of Article 19 should be merged into one section, and the entire provision could have the following wording: If a platform operator makes misleading statements about suppliers or customers, or about goods, services or digital content offered by suppliers, the platform operator is liable for damage that this misleading information has caused to customers or to suppliers. The reason for adopting this wording of the provision is the fact that misleading statements made by a platform operator about customers may also cause damage to the customers, and not only to suppliers; just like misleading statements about suppliers or about goods, services or digital content offered by suppliers may cause damage not only to customers but also to suppliers (though the content of particular platform-customer contracts and platform-supplier contracts may specify what kind of statements about suppliers or customers may be made by a platform operator).

Example: A platform operator accidentally posted in the profile of a particular supplier of accommodation services a symbol that, for example, certifies reliability and trustworthiness of a supplier. This supplier, as a result of the symbol posted in his profile, initially obtains more customers for apartments and rooms offered by him. However, following a short period of time, negative comments are posted in his profile by customers who expressed their dissatisfaction due to the supplier's failure to offer services with features guaranteed by the symbol. The negative nature of the comments posted by the customers leads to the cancellation of reservations by other customers, who had made these reservations before the symbol was posted in the supplier's profile. As a result of the cancellations, the supplier does not gain the expected income and loses a source of revenue.

Finally, as demonstrated by the analysis of Article 19, a critical remark of a more general nature may be made with respect to another unresolved issue. The Discussion Draft is silent regarding the impact of statements made by the platform operator on the contents of the supplier-customer contract. Although the determination of this issue does not change the rule of liability under

Article 19, it may be of some importance with respect to assessing damage (see the above observations). However, the answer should result from general rules referring to the liability of the platform operator, so this issue should not be regulated within the content of Article 19.